23

IN THE

Supreme Court of the United States

October Term, 1941.

No. 1022

IN THE MATTER

—*of*—

WARREN ELDRETH GREEN,
On Habeas Corpus.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

WARREN ELDRETH GREEN, *In Person,*
Onondaga Indian Nation,
P. O. Address,
R. D. #1,
Nedrow, N. Y.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

INDEX.

Table of Cases Cited

STATUTES

TREATIES

U. S. CONSTITUTION

IN THE

Supreme Court of the United States

October Term, 1941.

No. 104

IN THE MATTER

—of—

WARREN ELDRETH GREEN,
On Habeas Corpus.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

Prayer.

Warren Eldreth Green prays that a Writ of Certiorari issue to review the judgment and Order for Mandate entered December 10, 1941, in the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause.

Question Presented.

The sole question presented in this case is whether the petitioner, on account of his being an Onondaga Indian, re-

siding and living in his tribal relationship in the Onondaga Indian Reservation located within the confines of the territorial boundaries of the State of New York, being a member of the Onondaga Nation of Indians and the Six Nations of Indians (Iroquois Confederacy of Indians), was on the 9th day of May, 1941, not subject to draft in the armed forces of the United States pursuant to the provisions of the Selective Service and Training Act of 1940.

The above question must be answered in petitioner's favor if any one of the following four propositions are true. Each of these four propositions presents a legal question.

1. The treaties entered into between the United States and the Six Nations of Indians secure the petitioner against the draft.

2. The petitioner is not a citizen of the United States in spite of the Act of Congress, Section 3, Title 8, U. S. Code (since repealed) and the Act of Congress known as the Nationality Act of 1940, U. S. Code, Title 8, Section 601, purporting to confer citizenship upon him.

3. Said Nationality Act of 1940 contains a saving clause, namely,

> "The following shall be nationals and citizens of the United States at birth: A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property."

which preserves his right not to be subject to the draft.

4. The Selective Service and Training Act of 1940, Sections 303, 304, Title 50 U. S. Code, on its face is inapplicable to Green.

Statutes and Treaties.

Selective Service and Training Act of 1940, United States Code, Title 50, Section 303, Subdivision A as relevant to this proceeding.

> "Except as otherwise provided in this Act, every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest."

United States Code, Title 50, Section 304, Subdivisions A and B in full:—

> (A) "The selection of men for training and service under Section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted; Provided,

That in the selection and training of men under this Act, and in the interpretation and execution of the provisions of this Act, there shall be no discrimination against any person on account of race or color."

(B) "Quotas of men to be inducted for training and service under this Act shall be determined for each State, Territory, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, and the District of Columbia, and the subdivisions thereof, who are liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the land and naval forces of the United States on the date fixed for determining such quotas. After such quotas are fixed, credits shall be given in filling such quotas for residents of such subdivisions who subsequently become members of such forces. Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustments therein shall be made when such actual numbers are known. All computations under this subsection shall be made in accordance with such rules and regulations as the President may prescribe. September 16, 1940, 3:08 p. m. E. S. T., C 720, §4, 54 Stat. 887."

Nationality Act of 1940 being Section 601, Title 8 United States Code, Subdivision A and B as pertinent:—

"The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jursidiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property."

Act of Congress, March 3, 1871, being Section 71 of Title 25, United States Code as follows:

"Future treaties with Indian tribes. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Treaties Applicable.

Treaty between the United States and Six Nations made at Fort Stanwix, October 22, 1784. (Volume 7, United States Statutes at Large, page 15).

This treaty, after declaring certain guarantees and establishing certain boundary lines between the United States and the Six Nations, then went on to guarantee that the Indians of the Six Nations "shall be secured in the peaceful possession of the lands they inhabit east and north" of said boundaries.

Treaty between United States and Six Nations made at Fort Harmar, January 9, 1789, (Volume 7, United States Statutes at Large, Page 33).

This treaty was made "for removing all causes of controversy, regulating trade, and settling boundaries between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part." In Article I of this treaty, the treaty of 1784 was referred to, and the contracting parties renewed and confirmed "all the engagements and stipulations entered into at the beforementioned treaty at Fort Stanwix." And again in the treaty of 1789, it states that the "undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the consideration beforemention, do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait from the mouth of the Ononwayea and Buffalo Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever." Article 11 provided that the United States of America "confirm to the Six Nations, all the land which they inhabit, lying east and north of the beforementioned boundary line, and relinquish and quit claim to the same and every part thereof, except only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents." Article IV declared "The United States of America renew and confirm the peace and friendship entered into with the Six Nations (except the Mohawks), at the treaty

beforementioned, held at Fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included."

Treaty between the United States and Six Nations made at Canandaigua, New York, on November 11, 1794, (Volume 7, United States Statutes at Large, Page 44).

This treaty provided in Article 1, "Peace and friendship are hereby established and shall be perpetual between the United States and the Six Nations." Article 11 acknowledged the lands reserved to the Oneida, Onondaga and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property, and vowed that the United States will never claim the same nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; and guaranteed the said reservations to remain theirs until they choose to sell the same to the United States, and Article IV was a guarantee by the Six Nations never to claim the lands within the boundaries of the United States, and never to disturb the people of the United States in the free use and enjoyment of their lands. Article VI provided for certain annual payments to be made to the Six Nations by the United States. Article VII provided that in case of injuries done by the misconduct of individuals on the part of either side, that appropriate complaint should be made by the injured party to the other of the contracting parties, declaring that no private revenge or retaliation shall take place.

Statement.

This proceeding was commenced on the 9th day of May, 1941, when the Hon. Frederick H. Bryant, United States District Judge for the Northern District of New York, granted at the Federal Court House in the City of Syracuse, New York, a Writ of Habeas Corpus on the petition of Rosetta Green, verified the 9th day of May, 1941, wherein the said Writ commanded D. W. McLaren, Major of the United States Army, then at Syracuse, New York, to produce the body of Warren Eldreth Green, together with the date and cause of his being taken and detained, before the Hon. Frederick H. Bryant, Judge of the United States District Court for the Northern District of New York, at the Court House on the 14th day of May, 1941, so that the question of the legality of the custody of said Warren Eldreth Green should be determined. Wilfred E. Hoffmann, attorney, of Syracuse, New York, appeared in said proceeding as attorney for the petitioner and said Warren Eldreth Green. Ralph Emmons, United States Attorney for the Northern District of New York, through Robert J. Leamy, assistant United States attorney for said district, appeared for D. W. McLaren. The petition for the Writ of Habeas Corpus and the Writ of Habeas Corpus were filed with the Clerk of the said district court on the 14th day of May, 1941, the return of D. W. McLaren, Major in the United States Army and in charge of the induction station for Selective Service Act trainees at Syracuse, New York, made and swore to his return on the 14th day of May, 1941, and said return was filed with the Clerk of the district court, on the 14th day of May, 1941. The hearing on said Writ of Habeas Corpus was had before the Hon. Frederick H. Bryant, a Judge of said district court, at the Fed-

eral Court House at Syracuse, New York, on the 14th day of May, 1941. No question was referred to a commissioner or commissioners, master or referee. An order denying the discharge of said Green from custody was made by the Hon. Frederick H. Bryant on the 14th day of May, 1941, and said order was filed with the Clerk of the district curt on the 14th day of June, 1941. A notice of appeal from said order was filed with the clerk of the district court in behalf of said Warren Eldreth Green on July 3, 1941, and a copy thereof was served upon the United States Attorney for said district on the same day. An order extending appellant's time within which to file his record on appeal and docket the appeal in the Circuit Court of Appeals was made by the Hon. Frederick H. Bryant on the 6th day of September, 1941, and said order was duly filed on the 23rd day of September, 1941.

The appeal was argued in the Circuit Court of Appeals on October 20, 1941, and the court made its decision on November 24, 1941, reported in 123 Fed. 2nd, 862 (Federal Reporter, Second Series, Advance Sheets, dated January 19, 1942.) The Order for Mandate was entered in the Circuit Court December 10, 1941.

On May 9, 1941, when said Writ of Habeas Corpus was granted, the said Warren Eldreth Green, was in the custody of Major Donald W. McLaren of the United States Army, having surrendered himself to said custody as a result of a notice mailed to him April 25, 1941, by Local Board #474 at Syracuse, New York, (fol. 23). The Writ of Habeas Corpus referred to above was granted upon petition of said Warren Eldreth Green's mother, Rosetta Green, (fols. 7-16).

At the time Green was in said custody he was a member of the Onondaga Nation of Indians, (fol. 8); he was born in and always lived upon the Onondaga Indian Reservation and never lived separate or apart from his tribe, (fol. 9). He was a member of the Six Nations of Indians, also known as the Iroquois Confederacy (fol. 8). The Onondaga Nation of Indians is located within the confines of Onondaga County, State of New York. This nation is controlled by a body of some eighteen or nineteen chiefs (fol. 58), and they are the sole governing power of the internal affairs of the Onondaga Nation (fol. 58). The Onondaga Nation is one of the Six Nations of the State of New York (fol. 58). The confederacy of Six Nations of the State of New York is controlled by a body of special delegates from each of the respective Six Nations (fol. 59). The chiefs of the Onondaga Nation are appointed to their office by virtue of a special custom and usage which has been prevalent among the Onondagas for a long time before this country was settled by the whites (fol. 59). The Council of Chiefs of the Onondaga Nation has the right to determine disputes that arise upon the reservation (fol. 56). They have the right to enforce their decrees (fol. 57). However, these Indians often use the State and Federal Courts for the settlement of their disputes (fol. 57). The Onondagas claim to own the fee in the land they occupy, and claim that the fee is neither in the State nor in the Federal government, (fol. 60). These New York State Indians have always occupied the land they now possess. They are the original possessors of their soil (fol. 62; and a matter of history).

Upon the above facts the question hereinbefore stated is predicated.

There have been no changes in attorneys or parties in this proceeding, except petitioner is appearing on the application in person.

Rulings of the Courts Below.

The District Court did not dispose of this case upon the merits (fol. 71). The Court in ruling stated:

> "A question of that scope cannot be settled conclusively by any decision of a District Judge. It is a question that must, in order to have a decision carry final weight, be passed upon in some form by a Higher Court. I do not feel that I should interpret it. In these days of hectic defense preparation any interpretation of the so-called Citizenship Act of 1924 and the so-called Selective Service Act, granting, or tending to grant, exemption or exclusion, should not be made by a District Judge."
>
> "On the record and under the statutes, I deny the writ."
>
> "I have made a short record so that Mr. Hoffmann can take the question quickly to a higher Court."

The Circuit Court of Appeals affirmed the decision of the District Court. The Court ruled that the petitioner was subject to the Selective Service and Training Act of 1940. In this connection the Court ruled,

(1) in regard to the treaties by stating "assuming arguendo, the validity of his argument as to the treaty status of the Indian tribe to which he belongs, and the statutes of 1924 and 1940 (Referring to the citizenship acts) yet these statutes are not, on that account, unconstitutional. Where a domestic law conflicts with an earlier treaty, that the statute must be honored by the domestic courts has been

well established at least since the Head Money Cases, 1884, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798." Green had contended that the United States in negotiating these treaties had recognized the sovereignty of his tribe to which he belongs and therein guaranteed him peaceful possession of his home and to never molest nor disturb him, and that by history and the very force of these treaties he could not be similarly dealt with as those who were truly a part of the government of the people of the United States.

(2) also in regard to citizenship by stating, "whatever doubt there might be concerning the 1924 statute, because of its title, the 1940 statute unequivocally made Green a citizen."

(3) that the saving clause in the 1940 Act to the effect that "the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person or tribal or other property" rather hurts than helps Green's case, "for Congress by expressly excepting property rights, emphasized its intention to impose all other obligations of citizenship."

(4) that the Selective Service and Training Act of 1940 was intended to apply to an Onondaga Indian occupying a position similar to Green because 50 U. S. C. A, appendix, Section 303 (a) includes "every male citizen" and that the provision in Section 304 (b) of the Act for quotas in which reference is made to "the several States, Territories, and the District of Columbia," was intended merely to determine such quotas, and cannot reasonably be said to imply that, for the purpose of determining the persons subject to the Act, those living in Indian Reservations should be excluded.

Reasons for Granting Petition.

It is respectfully submitted that this petition ought to granted for the reason that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. Namely, is an Onondaga Indian, living upon his own Onondaga Indian lands, being a member of the Onondaga Indian Nation as well as a member of the Six Nations (Iroquois Confederacy), subject to the Selective Service and Training Act of 1940?

All members of the Six Nations are affected by the ruling already made by the Circuit Court of Appeals. The Act was construed as applicable to these Indians, and this in spite of the repeated holdings of the United States Supreme Court that general acts of Congress do not apply to them, unless so worded as clearly to manifest an intention to include them in their operation. McCandless, Commissioner of Immigration, vs. United States ex rel, Diabo 25 Fed. 2nd 71; United States vs. Reichert, 188 U. S. 432, 23 S. Ct. 478, 47 L. E. 532; Elk vs. Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643; Cherokee Nation vs. Georgia, 5 Pet. (30 U. S.) 17, 8 L. Ed. 25. Again, in Cherokee Intermarriage Cases, 203 U. S. 76, 94, the court held it to be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." Perhaps this "settled rule" would be of even greater force in the instant case when it is remembered that these Six Nation Indians were never conquered and in addition have treaty rights with the federal government, in regard to which rights the Act of Congress of March 3, 1871, Section 71, Title 25, United States Code, stated "but no obligation

of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." It is further submitted that the Acts of Congress purporting to confer citizenship upon Green is unconstitutional because under the 14th Amendment to the United States Constitution the authority of Congress to create citizens by naturalization or other statute is limited to persons completely "subject to the jurisdiction" of the United States, and Indians occupying a similar status to Green have never been subject to, or at least completely subject to, the jurisdiction of the United States—and especially so from a political standpoint. See Elk vs. Wilkins, 112 U. S. 94.

In regard to the treaties the Circuit Court of Appeals in the instant case said that where a domestic law conflicts with an earlier treaty, that the statute must be honored has been well established at least since the Head Money cases, supra. However, in the Head Money cases the Supreme Court stated that where a treaty contains provisions conferring rights upon citizens or subjects of one of the contracting nations residing in the territorial limits of another, these are capable of enforcement in our .courts While it is stated that such a treaty may be repealed by an Act of Congress, it would hardly seem that Green would be intended to be subject to the Selective Service and Training Act of 1940, especially in view of the fact that,

(1) he possesses treaty rights with a government which all humanity respects for its fulfillment of its treaty obligations.

(2) section 71, title 25, U. S. Code is still a law.

(3) the fact that Indians, when referred to in

our Constitution, are referred to specifically by name.

(4) Selective Service Act does not refer to Indians of existing organized tribes, nor even to Indians at all.

(5) the questionable power of Congress to make Green a citizen.

(6) the repeated decisions of the U. S. Supreme Court holding Acts of Congress inapplicable to Indians unless so worded as to clearly manifest an intention to include them in their operation and holding laws are to be construed most favorably to them.

(7) the failure to refer to Indian territories or reservations in Section 304 (b) of the Selective Service and Training Act of 1940.

Respectfully submitted,

WARREN ELDRETH GREEN,
Petitioner, in Person,
Onondaga Indian Nation,
P. O. Address,
R. D. #1,
Nedrow, N. Y.

BRIEF FOR PETITIONER.

Opinions.

The District Court did not pass upon the merits of the case, but paved the way for a speedy appeal. A short statement for the record was made by District Judge Frederick H. Bryant on May 14, 1941. It appears on page 24. The opinion of the Circuit Court of Appeals (Judge Frank writing) was filed November 24, 1941. It appears in the record. It is reported in 123 Fed. 2nd, 862.

Jurisdiction.

Jurisdiction of the court is invoked under 28 U. S. C. A., Section 347 (Judicial Code, Section 240).

Facts.

The facts appear sufficiently stated in the petition, and neither repetition nor emphasis here seems necessary.

Argument.

Green, on account of his being a full-blooded Indian, a member of the Onondaga Nation of Indians, residing upon the lands of that Nation, and a member of the Iroquois Confederacy, is not subject to the provisions of the National Selective Service and Training Act of 1940.

Except for the Citizenship Act of 1924, Section 3, Title 8, U. S. Code (since repealed) and the Nationality Act of

1940, U. S. Code, Title 8, Section 601, purporting to confer citizenship upon Indians (as well as others), Green would not be a citizen (Elk vs. Wilkins, 112 U. S. 94), and never having declared his intention to become a citizen, he clearly would not be subject to draft. Selective Service and Training Act of 1940, U. S. Code, Title 50, Section 303, Subdivision a.

POINT I.

The above acts purporting to confer citizenship upon Green were enacted in violation of the United States Constitution.

The fundamental basis for citizenship is found in Amendment XIV, Section 1, first clause of the United States Constitution. It reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In the instant case, the Circuit Court held that "whatever doubt there might possibly be concerning the 1924 statute, because of its title," (purporting to make Indians citizens), "the 1940 statute unequivocally made Green a citizen."

None of the Six Nations' Indians ever sought, asked for, or consented to their being made citizens (page 16). All of the Indians of the State of New York, in their organized capacity have opposed this legislation purporting to

make them citizens (page 16). Thus, no waiver of their rights in this respect can be asserted.

The record, as stipulated, shows that the Onondaga Nation through its chiefs has its own method of self-government, and that is its customary form of government which has prevailed before this country was settled by the whites (page 20); that the Six Nations has its own form of government which is in control of affairs common to the Six Nations, (page 20). Certainly, that Green owes allegiance to and is controlled to a large degree by his own Indian Nation as well as by the Six Nations government, there can be no question.

With the above in mind, can it be said that Congress had the constitutional power to make Green a citizen? In Elk vs. Wilkins, 112 U. S. 94 (1884), the court held that a certain western Indian who had separated from his tribe was not a citizen because he had been born on Indian tribal lands and thereby was not born "subject to the jurisdiction" of the United States as required under the 14th Amendment to the United States Constitution. The Supreme Court in this case even went further in respect to this question of jurisdiction and stated that this clause in the 14th Amendment meant "completely subject to the jurisdiction" of the United States. If this western Indian was not a citizen because not at birth completely subject to the jurisdiction of the United States, then how could Green be made a citizen by collective naturalization when not completely (if at all) subject to the jurisdiction of the United States? The placing of the commas in the first sentence of Section 1 of the 14th Amendment is significant. To be a citizen one must be born in and be subject to the

jurisdiction of the United States at the time of his birth, *or* he must be naturalized in the United States and at the time of his naturalization be subject to (completely subject to) the jurisdiction of the United States.

Our United States Constitution has referred to the Indians as a race separate and apart from our body politic. United States Constitution, Article 1, Section 2, Paragraph 3, 14th Amendment, Section 2 of the United States Constitution.

When the United States Constitution was adopted it contained no definition of citizenship. In 1868 by the adoption of the 14th Amendment for the first time citizenship was defined. Before the 14th Amendment, it was generally believed that United States Citizenship, except in cases of naturalization, was subordinated to and derived from State Citizenship. Burdick, "The Law of the American Constitution" (1922), p.p. 318, 322. It was also considered that a naturalized citizen of the United States, by residence in any state, was *ipso facto* a citizen of such state. Story, "Commentaries on the Constitution," Secs. 1693, 1694 (1851). The 14th Amendment resulted from Chief Justice Taney's opinion in the Dred Scott Case, 19 Howard 393 (1857). After the 14th Amendment United States Citizenship became paramount and dominant instead of subordinate and derivative. Selective Draft Cases, 245 U. S. 366, 389 (1918).

Two general ways have been recognized by the nations of the earth of acquiring citizenship, (1) by birth, (2) by naturalization. The former, also known as citizenship of origin, are regarded as native-born citizens. Citizenship by

birth has had its foundation either under the rule of "jus sanguinis" or under the rule of "jus soli," or combination of the two rules. Harvard Research, 23 Am. Jour. Int. Law Spec. Supp. 29 (1929). The principle of "jus soli," being of feudal origin, developed from the idea that territorial sovereignty tended to create a relationship between the person and the land to which he was attached. See Lynch vs. Clark, 1 Sanford's Chancery Reports, 583, 655 (1844). "Jus soli" is a part of the common law of England, and it is this principle which is set forth in the 14th Amendment. This amendment requires not only birth or naturalization in the United States, but also "subject to the jurisdiction." In Wong Kim Ark vs. United States, 169 U. S. 649, 693 (1898) it was stated that those persons not "subject to the jurisdiction" are (1) children of foreign sovereigns or ministers, (2) those born on foreign public ships in the territorial waters of the United States, (3) children born of enemies in hostile occupation, and (4) children of Indian tribes.

Before an attempt was made by Congress in 1924 to collectively naturalize the Indians, the United States Supreme Court in Elk vs. Wilkins, supra, held that an Indian born in Indian territory could not be a citizen within the constitution because he was not "born in the United States and subject to the jurisdiction thereof."

It is therefore respectfully submitted that Congress had no right to force citizenship upon an Indian owing allegiance to his own tribe and living upon his own Indian lands. The 14th Amendment is a constitution limitation against such.

Under principles of International Law your petitioner recognizes citizenship by treaty upon (1) annexation, (2) admission to statehood, (3) cession of territory, and perhaps (4) by conquest but no such conditions exist in the instant case. When such conditions do exist, always there will be found either consent to citizenship, or "subject to jurisdiction."

To have naturalization, either individual or collective, the subjects must be "subject to the jurisdiction" of the United States. This constitutional limitation relative to citizenship by birth is likewise applicable to citizenship by naturalization.

The United States to a very limited degree recognizes the law of "jus sanguinis" citizenship, that is, citizenship determined by parentage. This is only applicable to persons born abroad of American parentage. If the question arises as to whether or not such citizenship is within the constitutional limits of the 14th Amendment on the ground that there is a lack of "subject to jurisdiction thereof," then the answer is that this is a citizenship created by naturalization, that is, Act of Congress, and that these citizens born abroad are considered "natural-born citizens." The first law providing for citizenship "jure sanguinis" expressly provided that children born abroad of citizens of the United States would be considered "natural-born citizens." Law of March 26, 1790, 1 Stat. L. 103 Chap. 3. While subsequent enactments omitted the word "natural-born", it seems quite plausible that the omission was unintentional.

POINT II.

Even though these so-called citizenship acts of 1924 and 1940 were valid enactments, yet they reserve to Green a right to be secure from the draft.

Both the 1924 (now repealed) and 1940 Acts (supra) state that the granting of citizenship to Indians shall not in any manner impair or otherwise affect the right of such person to tribal or other property. "Tribal" property and "other property" refers to the rights of Indians generally. In 8 U. S. C. A., Section 3, wherein there was conferred on Indians who served for the United States in the World War the right of citizenship upon formal application, the citizenship thereupon granted was stated not to impair or affect the "property rights, individual or tribal, of any such Indian, or of his interest in tribal or other Indian property." The protection of the rights of Indians upon citizenship, while appearing broader in respect to the Indian soliders, certainly was not intended to be narrower in the case of the other Indians. The question then is, what are these tribal and property rights that were preserved. Their rights as a distinct and at least quasi-sovereign people would exclude them from the operation of the Selective Service and Training Act of 1940, and so would their rights under their treaties with the United States exclude them from the operation of this Act. While said Act refers to "all citizens," yet the obligations of the Act would be correspondingly mitigated by the obligations of the particular citizen as imposed upon his "qualified" admission to citizenship. The admission of the Indians to citizenship appears to be a qualified admission.

As these treaties of 1784, 1789 and 1794 are referred to in the record and petition fully, as pertinent, their terms are not repeated here. It seems clear that these treaties would secure Green against the "draft," unless the terms of these treaties have been legally changed whether by statute or otherwise. In each of these treaties, not only was the independence and the sovereignty of these Indian tribes recognized and acknowledged by the United States, but they were guaranteed by the most solemn of all contractual obligations to be secured in the peaceful possession of their lands. They were assured never to be disturbed, and were assured peace and friendship. It is submitted that Green's peaceful possession of his home has been destroyed and he has been "disturbed" when drafted into the armed forces of the United States. In Mason vs Sams (D. C. Wash. 1925) 5 Fed. (2nd) 255, it was held that the second sentence of Section 3, Title 8, U. S. Code preserved fishing rights of certain Indians. Thus this right has been broadly construed by the judiciary. The United States Supreme Court has held that treaties with the Indians are to be construed as "that unlettered people" understood them, and that construction of treaties should favor the Indians. Mason et al vs. Sams, Superintendent of Indian School, etc., 5 Fed. 2nd 255, U. S. vs. Winans, 25 S. Ct. 662, 46 L. Ed. 1089, Seufert Bros. Co. vs. U. S. as trustee, etc., 249 U. S. 194-196, 39 S. Ct. 203, 63 L. Ed. 555, Cherokee Nation vs. U. S., 203 U. S. 76, 89, 94, 27 S. Ct. 29, 51 L. Ed. 96, and numerous cases. The Indians undoubtedly felt that in making these treaties, they were dealing as an independent people.

While in 1871 Congress decided against making further treaties with the Indians, yet Congress also stated that

"no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Section 71, Title 25, U. S. Code. It is a matter of common knowledge that our government is even to this day annually fulfilling certain stipulations of these early treaties. The apparent intent of the legislative as well as the executive branches of our government is that these treaties are in force and are to be honored. Any attempted piecemeal dissolution of such treaties hardly would be conceivable, except by an express declaration of the legislature specifically referring to these Indians by name.

In negotiating these treaties with the Six Nations, the United States recognized these Indian Nations as a party who was capable of entering into the solemn obligations of a treaty. In Cherokee Nation vs. The State of Georgia, 5 Peters 1, the Supreme Court said:

> "The Constitution by declaring treaties already made as well as those to be made to be the Supreme Law of the Land has adopted and sanctioned the previous treaties with the Indian Nations and consequently admit their rank among those powers who are capable of making treaties. The word 'treaty' and 'Nation' are words of our own language selected in our diplomatic proceedings and have a definite and well-understood meaning. We have applied them to the Indians as we have applied them to the other Nations of the earth. They are applied to all in the same sense."

It is therefore submitted the Selective Service Act would not be applicable to a citizen who as a citizen had a right

to be exempt from the draft, a right which was preserved to him upon his admission to citizenship.

POINT III.

The Selective Training and Service Act of 1940 on its face is not applicable to our New York State Indians, and was not intended to apply to them.

Section 303, Subdivision A, of this Act, as of the time of Green's induction, first states that every male citizen of the United States and every male alien who has declared his intention to become such a citizen, between ages of 21 and 36 shall be liable for training and service in the land or naval forces of the United States. Then the President is authorized to induct "in the manner provided in this Act" such men as in his judgment is required in the national interest, not exceeding 900,000, except in time of war.

Section 304 determines the "manner of selecting men for training and service." Sub-section (a) provides that it shall be made in an impartial manner, under such rules and regulations as the President may prescribe for the men so qualified. Sub-section (b) is the particular portion of the Act which appellant claims to demonstrate that the Act does not and never was intended to apply to the Six Nations' Indians. It reads in part as follows: "Quotas of men to be inducted for training and service under this Act shall be determined for each State, Territory, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States,

Territories, and the District of Columbia, and the sub-divisions thereof, who are liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such sub-divisions who are in the land and naval forces of the United States on the date fixed for determining such quotas." It is clearly discovered that the President is given authority in this Section to induct men only from each State, Territory, and the District of Columbia, and for subdivisions thereof. It would seem very apparent that the Congress in enacting this section never intended that Indians of the organized tribes should be subject to compulsory military training. Certainly the lands occupied by the organized tribes of the State of New York and particularly the Onondaga Nation of Indians are not a "STATE." The remaining question to decide is whether they are a "Territory" within the meaning of the ACT. The definition of the word "Territory" has a well-understood meaning and clearly would not include the lands occupied by the Onondaga Nation of Indians. "Territories" are mere dependencies of the United States, exercising delegated powers. Syoms vs. Eichelberger, 144 N. E. 279, 281, 110 Ohio St. 224.

"Territories" are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which the counties bear to the respective states, and Congress may legislate for them as a state does for the municipal organizations. First National Bank of Brunswick vs. Yankton County, 101 U. S. 129, 133, 25 L. Ed. 1046. See also Corpus

Juris for the definition of the word "Territory" or "Territories."

In McCandless, Commissioner of Immigration vs. United States ex. rel Diabo, 25 F. 2nd 71, decided March 9, 1928, it was said: "The question involved is whether the immigration laws of the United States apply to members of the tribe of the Six Nations born in Canada. Enlightened possibly by the status and relations of our own native Indians with reference to our own nation, we note that the unbroken line of decision has been that they stand separate and apart from the native-born citizen, that they are wards of the nation, and that the General Acts of Congress do not apply to them, unless so worded as clearly to manifest an intention to include them in their operation." In support of this statement the Court cited United States vs. Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532; Elk vs. Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643; Cherokee Nation vs. Georgia, 5 Pet. (30 U. S.) 17, 8 L. Ed. 25.

In Cherokee Intermarriage Cases, 203 U. S. 76 at page 94, the Court held it to be "the settled rule that as between the whites and the Indians, the laws are to be construed most favorably to the latter."

From what is stated in the preceding pages there would seem no apparent intention upon the part of Congress to repeal existing treaties with the Six Nations' Indians in its enactment of the Selective Service and Training Act.

Conclusion.

Petitioner respectfully prays that the United States Supreme Court issue a Writ of Certiorari herein.

Respectfully submitted,

WARREN ELDRETH GREEN, in Person.

WILFRED E. HOFFMANN, of Counsel,
621 City Bank Building,
Syracuse, New York.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1022

WARREN ELDRETH GREEN, PETITIONER

v.

D. W. MCLAREN, MAJOR, U. S. ARMY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 28–30) is reported in 123 F. (2d) 862.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1941 (R. 31). The petition for a writ of certiorari was filed March 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a member of the Onondaga Tribe of Indians is a citizen of the United States subject to military service under the Selective Training and Service Act of 1940.

STATUTES INVOLVED

The Act of June 2, 1924, 43 Stat. 253 (8 U. S. C., sec. 3), provided:

> all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The Nationality Act of 1940, 54 Stat. 1138 (8 U. S. C., sec. 601), provides in part:

> SEC. 201. The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

The Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. Appendix, sec. 303), provided in part:

> Except as otherwise provided in this Act, every male citizen of the United

States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. * * *

STATEMENT

On May 14, 1941, in the District Court of the United States for the Northern District of New York, the mother of Warren Eldreth Green filed a petition for a writ of habeas corpus to obtain the release of her son from the custody of Major D. W. McLaren, United States Army, officer in charge of the induction station at Syracuse, New York (R. 3–6). The petition alleged that Green, a member of the Onondaga Nation of Indians, a resident of the Onondaga Indian Reservation, and a member of the Iroquois Nation of Indians (R. 3), had been selected for training and service and inducted into the United States Army by order of Local Board No. 474 of Syracuse, New York, under the Selective Training and Service Act (R. 4); and that Green's induction and further detention in custody was unlawful because Green is not a citizen of the United States, notwithstanding the Act of June 2, 1924 (*supra*), conferring citizenship upon all Indians born within the territorial limits of the United States (R. 4–5). The writ issued (R. 6–7), and the respondent filed

a return setting forth the facts of Green's registration, classification in I–A,[1] physical examination and induction, and alleging that Green was a citizen of the United States subject to the provisions of the Selective Training and Service Act (R. 7–9).

At the hearing it was stipulated that "none of the Six Nations ever asked that that law [Act of June 2, 1924] be enacted. None of the Six Nations were ever consulted. Their advice was never sought. It was Legislation put through by the Congress without any instigation upon the part of any of the Indians. It was an Act passed which all the Indians of this State [New York] in their organized capacity opposed. They have never consented to it. They have never accepted of its provision" (R. 16). It was further stipulated "that the Council of the Chiefs has the undisputed right as far as each Nation is concerned to determine its own dispute" (R. 19); and that the internal affairs of the Onondaga Nation are controlled by a body of eighteen or nineteen chiefs; that the Onondaga Tribe is one of the Six Nations; that the Confederacy of Six Nations is governed by a body of delegates from each of the Six Nations in affairs common to the Six Nations; and that the Onondaga Chief is appointed according to tribal custom and usage (R. 20).

---

[1] "Class I–A; Available; fit for general military service." Selective Service Regulations, Vol. 3, p. 10 (Classification and Selection), prescribed by Executive Order No. 8560, Oct. 4, 1940.

The district court discharged the writ because it was unwilling to accept the Indians' claim of exemption in the absence of a favorable decision by an appellate court (R. 24). On appeal, the circuit court of appeals affirmed the order discharging the writ and held that Green was a "citizen" subject to the Selective Training and Service Act (R. 29–30).

ARGUMENT

The question here raised concerning petitioner's[2] citizenship status no longer presents a question of practical importance either to petitioner himself or to others of like situation who have not yet been inducted under the Selective Training and Service Act of 1940. The limitation of that Act to citizens (*supra*) has since been removed by an amendment which provides that (with certain exceptions, not herein pertinent) "every male citizen * * * *and every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces * * *" (Public Law 360, 77th Cong., approved December 20, 1941; italics supplied). Accordingly, the citizenship status of petitioner

[2] Although the petition for the writ of habeas corpus was filed by Rosetta Green on behalf of her son, Warren Eldreth Green, the petition for a writ of certiorari was signed by Warren Eldreth Green in proper person, and he will be referred to hereinafter as "petitioner." It is stated (Pet. 11) that "There have been no changes in attorneys or parties in this proceeding, except petitioner is appearing on the application in person."

and other members of the Onondaga Tribe of Indians is now irrelevant under the Act.

But in any event, the decision of the court below is correct. Petitioner contends that the treaties of 1784,[3] 1789,[4] and 1794[5] preclude petitioner's induction into the armed forces under the Selective Training and Service Act of 1940 (Pet. 2, 22–23). But it is well settled that "an Act of Congress may supersede a prior treaty" whether the treaty is one with a foreign nation or with an Indian Tribe (*Cherokee Tobacco Case,* 11 Wall. 616, 621) and that a treaty "is subject to such acts as Congress may pass for its enforcement, modification, or repeal." *Head Money Cases,* 112 U. S. 580, 599; see also *Thomas* v. *Gay,* 169 U. S. 264, 271, and *Sanchez* v. *United States,* 216 U. S. 167, 176. Green's status, therefore, must be determined in the light of the terms of the statutes involved and it is clear that the 1924 and 1940 statutes unequivocally conferred citizenship upon him. As the circuit court of appeals held (R. 30), the provisions in the 1940 statute, preserving Green's right "to tribal or other property," merely "emphasized its [Congress'] intention to impose all other obligations of citizenship."

---

[3] The treaty between the United States and the Six Nations, made at Fort Stanwix, October 22, 1784 (7 Stat. 15).

[4] The treaty between the United States and the Six Nations, made at Fort Harmar, January 9, 1789 (7 Stat. 33).

[5] The treaty between the United States and the Six Nations, made at Canandaigua, New York, November 11, 1794 (7 Stat. 44).

Moreover, "citizenship is not incompatible with tribal existence" (*United States* v. *Nice,* 241 U. S. 591, 598), and Green's interests in tribal or other property "are mere property rights and do not affect the [his] civil or political status." *Matter of Heff,* 197 U. S. 488, 508–509, overruled on other grounds, *United States* v. *Nice, supra.*

Relying upon *Elk* v. *Wilkins,* 112 U. S. 94, petitioner urges (Pet. 17–21) that the Act of June 2, 1924 and the Nationality Act of 1940 cannot constitutionally confer citizenship on him because, as an Onondaga Indian, he was not completely subject to the jurisdiction of the United States at the time of his birth. However, while that decision held that Indians did not acquire citizenship by virtue of the Fourteenth Amendment, the Court there expressly said that Indians could be naturalized "by or under some treaty or statute." 112 U. S. 94, 103.

Petitioner further contends (Pet. 17–18) that Congress was powerless to impose citizenship on the Onondagas because none of the Six Nations Indians requested or assented to such legislation, but, in fact, opposed it. This Court has recognized, however, that the New York tribal Indians are wards of the Federal Government (*Fellows* v. *Blacksmith et al,* 19 How. 366), as are all other Indian tribes within the United States (*Worcester* v. *Georgia,* 6 Pet. 515), and that "It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and as-

sume the responsibilities attaching to citizenship." *United States* v. *Rickert,* 188 U. S. 432, 445. See also *United States* v. *Kagama,* 118 U. S. 375, 384; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 312; and *United States* v. *Boylan,* 265 Fed. 165 (C. C. A. 2).[6]

CONCLUSION

The decision below is correct and there is no conflict of decisions nor any question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
Attorneys.

APRIL 1942.

---

[6] Petitioner contends (Pet. 25–26) that he is not liable to induction because Indian reservations are not specifically mentioned in the quota provisions of the Act (50 U. S. C. Appendix, sec. 304 (b)). However, Section 3 (a) of the Act (50 U. S. C. Appendix, sec. 303 (a)) defines who is liable to induction, and Section 4 (b) merely declares that the quota for each State or Territory shall be based on the actual number of men within the State or Territory liable for service. While the Onondaga Indian Reservation is not a "State" nor a "Territory," petitioner admits that it is "located within the confines of the territorial boundaries of the State of New York" (Pet. 2), and residents of the reservation liable for training and service were clearly intended to be counted in determining the quota for New York State.

U. S. GOVERNMENT PRINTING OFFICE: 1942